UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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HONORABLE VIRGINIA A. PHILLIPS, DISTRICT JUDGE PRESIDING

ALEC FISHER, Plaintiff, vs. MONSTER BEVERAGE CORPORATION, MONSTER ENERGY COMPANY, ET AL., Defendants.	)	No. EDCV 12-02188-VAP

REPORTER'S TRANSCRIPT OF PROCEEDINGS

DEFENDANTS' MOTION TO DISMISS

LOS ANGELES, CALIFORNIA

FRIDAY, JUNE 21, 2013

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I N D E X

LOS ANGELES, CALIFORNIA; FRIDAY, JUNE 21, 2013

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(COURT IN SESSION AT 9:47 A.M.)

THE CLERK: Calling item one, EDCV CV 12-02188-VAP: *Alec Fisher, et al. v. Monster Beverage Corporation, et al.*

Counsel, please state your appearance.

MS. MEHDI: Good morning, Your Honor. Azra Mehdi for plaintiffs. With me is Melissa Wolchansky of Halunen & Associates. Ms. Wolchansky is not currently admitted. But we expect to file her pro hac vice papers; but I will be addressing the Court, Your Honor.

THE COURT: All right. Good morning.

MR. MARMALEFSKY: Good morning, Your Honor. Dan Marmalefsky and Purvi Patel on behalf of defendants.

MS. PATEL: Good morning.

THE COURT: Good morning.

All right. Both sides have had a chance to review the Court's tentative ruling?

MS. MEHDI: Yes, we have, Your Honor.

MR. MARMALEFSKY: Yes, Your Honor.

THE COURT: All right. Is there anything you wish to address in the tentative? And in particular, I know there are many issues here. So in particular, let me suggest that you probably want to address the standing issue. And it seems to me that one of the problems that I don't see how

leave to amend could remedy the state of the complaint, is as to the nature of the representations that are alleged -- and we went through them in detail near the end of the tentative ruling. I think each and every one of them are -- it's hard to imagine anything that could be better described as puffery than most of what you've alleged here as the basis for your -- your claims. I mean, to say that a statement that the beverage delivers a big bad buzz could contain an affirmation of facts, really boggles the mind. So -- and the same thing is true for the -- the statements that, you know, customers are going to dig these drinks; that there was a, you know, a poolside Vegas party, rehab pool party, all of those types of representations are so far from being actionable that I just -- I really question whether leave to amend is even appropriate. So I would suggest that those would be the best areas to focus upon.

MS. MEHDI: Thank you, Your Honor. I'll start with standing. I think the Court found that our plaintiffs, at least two of them, don't allege any physical injury which is partly the basis of the finding that there's no Article III standing --

THE COURT: Well, that's not precisely -- that's not really the holding that I made here. It's that their injury is conjectural.

MS. MEHDI: Well, Your Honor, I'm just looking at

the part where it says, Plaintiffs Fisher and Rucks do not allege any physical injury --

THE COURT: Okay. You need to slow down.

MS. MEHDI: -- okay -- rather they believe that the Monster drinks were safe for consumption and the -- the fact, had they known that Monster drinks could be bad for their health, they wouldn't have continued to purchase and consume. The Court found that these allegations were insufficient for Article III standing.

Your Honor, we -- we have in our opposition papers outlined why economic injury of the kind alleged by the plaintiffs is sufficient for purposes of Article III standing. And --

THE COURT: Well, what's the economic injury here? You're not claiming that they overpaid.

MS. MEHDI: We are claiming that they paid a premium for the drinks. And -- and because those drinks, unlike sports drinks, are -- are more expensive. And we'd be happy to -- the Court asked whether leave to amend would be appropriate. That would be one place where we could list out the prices of various drinks so that the Court may see why those drinks are more expensive than other -- than sports drinks which Monster claims that they are similar to. In fact, Monster's CEO and Rodney Sacks and president Hall have actually called Monster energy drinks the new soft drinks.

And so I think that we can try to demonstrate that the price differential between Monster energy drinks and the sports drinks is different and they are not the new soft drinks; that there are aspects of Monster Energy drink that are very harmful. In any event, that's what we would do.

The other aspect that I wanted to address -- well, let me -- you said the nature of representations, you find them really not to be misleading.

THE COURT: No, that's not what I stated. So that -- their classic puffery. They don't contain a statement of fact or a promise.

MS. MEHDI: Right. An actual puffery.

And plaintiffs don't agree with that characterization because, you know, you cannot look at those statements in a vacuum. You have to look at those statements in the context of advertising -- all of the advertising; not just the label on the can. And I will get to the point about the labeling in just one minute. I want to address the Court's concerns first.

Marketing to nine-year-olds and to 12-year olds and 13-year olds and saying that you will get a big buzz, that -- that is not just -- that is not inactionable puffery because it is sending a message. It's communicating the message that this is not alcohol, but it's like alcohol. Saying that Monster Energy drinks are the ideal combination of the right

ingredients and right proportion does -- it is actionable because it is an affirmation of fact. It's saying if you drink this, it's perfect for you. That is an affirmation of fact and that is a warranty. That's an express warranty. And so we believe that those are actionable. They're not inactionable puffery. Saying that a Monster Energy drink hydrates like a sports drink, that after a night of partying in Vegas -- Your Honor, I don't know if you've been to Vegas, but when you go to Vegas, the idea is that you drink and you -- everything is in excess, and you spend all night doing that. And then if you drink a Monster Energy drink, you're like brand new.

So the Court's parsing of the various representations as inactionable puffery in a vacuum, we say might do disservice to those affirmations of fact and representations that Monster Energy is putting out.

We'd be happy to take each one of the ones that the Court has put in its tentative, if it so chooses to issue it as its final ruling and amend the complaint to demonstrate why they're not inactionable puffery.

And then I wanted to address a couple of things. One is, the Court in the section on failure to allege with particularity, one of the things that the Court found was that plaintiffs' allegations of injury based on 20 different varieties when they specifically alleged only purchase of

eight varieties, is not specific enough. We'd be happy to put in a check mark against each variety that the plaintiffs bought, but the law doesn't require that. It requires that where products are substantially similar, that if you have bought a number of them and there's not much difference in the -- in the other products that are being consumed, that the plaintiff has standing to represent other people who have consumed those other varieties. And for that, I would advance the cases of *Ostiano v. Dreyer* and the *Jamba Juice* case.

And then finally, I wanted to addresses the Court's -- the finding that FDA's food label warnings do not impose the type of -- do not impose requirements for posting the type of warnings that plaintiffs are requesting.

Respectfully, Your Honor, the complaint alleges that the FDA hasn't done a premarket review of these dietary supplements. And, in fact, the FDA when it does focus -- when it did does review under 343Q, it reviews individual ingredients. It's not a product-specific analysis. In fact, as outlined in our opposition brief, the Food, Drug and Cosmetics Act is not focused on truth or falsity of advertising claims. So the requirements of what is adequate to -- adequate warning is not really something that the FDA regulates. That's within the state's ambit and that's something that the states regulate. And I will concede that

we're not trying to enforce, you know, federal regulations. We are not trying to enforce the FDCA or the NLEA. We have alleged that in the totality, defendant's conduct -- it's the conduct in -- in designing a product specifically to reach to young males, designing a marketing strategy, specifically to reach to the youth. And we've attached an internal marketing document that demonstrates that Monster intends and reaches out to young kids. That is what is what is within the State's rights. That is what States regulate; not the FDA. In fact, there is so much scrutiny on them right now because the FDA hasn't done enough. So those are my arguments.

And I think because a number of the remaining arguments on UCL, FAL rely on its threshold rulings, Your Honor. We're happy to amend --

THE COURT: Well, one of the concerns I have in listening to you this morning is, it sounds like if given leave to amend, you only envision adding to the complaint. One of the other bases for my ruling is that the -- is to grant the motion on the basis that it offends Rule 8. This is probably the most prolix complaint I have ever seen and has more irrelevant, inflammatory, extraneous allegations, including allegations that some reports indicate that the claw logo ranks close behind the boogie man or Frankenstein. I mean, I don't know what those reports are. And I don't know what it means to say that a logo ranks close behind the

boogie man. But that doesn't -- that doesn't belong in a complaint. You say that the complaint alleges that there are some reports that the drink has been associated with high risk behavior, including everything from marijuana use, sexual risk-taking, fighting, failure to use seat belts and taking risks on a dare. This does not belong in a complaint. And that's not even the end of that list.

I mean, this is not -- a complaint should not be confused with a press release. If you want to do a press release, do a press release. But this is not a short-claim statement of the facts upon which you're seeking relief.

All right. Do you wish to respond to the arguments with respect to puffery and standing, Mr. Marmalefsky?

MR. MARMALEFSKY: Very briefly, Your Honor.

First of all, with respect to standing in the statements made by counsel right now about Rodney Sacks or Mr. Hall making various statements, I mean, there are no allegations that any of these plaintiffs heard those statements; allegations about sports drinks and whether a Monster Energy drink hydrates like a sports drink. I mean, a sports drink first of all, isn't a defined term; but again, they're talking about 28 different varieties. The phrase "hydrates like a sports drink" is not on all 28 cans. It's on a couple of cans. They're talking about marketing to 9-year-olds and the evil about that; but, you know, none of

the plaintiffs are nine-year-olds. The plaintiffs aren't talking about any marketing specific to them. When you go to the cases that we relied on which the Court appears to have based its decision on with regard to standing, the issue is whether or not there is a cognizable actual injury. That something could be bad for someone's health is sort of the ultimate conjectural phrase. In contrast, the cases that find economic injury or where there is an affirmative representation in that representation, is false. So, for example, the *Quickset* case when someone purchases something that says "Made in the USA," and they say, I'm going to pay extra for this because it's made in the United States; I want to support American companies, there you have a statement that someone relied on to their detriment that caused an economic injury. There is no statement here that the plaintiffs have alleged or could allege that they were relying on to their detriment. There is no evidence here of paying a premium price. A person purchased an energy drink. And there's no evidence that an energy drink manufactured by Monster has one price point and an energy drink manufactured by another manufacturer has another price point.

I want to comment briefly on the -- what counsel said about the absence of a premarket review and the fact that the companies can decide to market their products if they've determined that they are generally recognized as

safe. And I agree with Your Honor when you say that any issue relating to food safety and food labeling is clearly preempted.

I would add to that, one of the additional preemption grounds that we had cited in which the Court references but doesn't discuss any opinion as primary jurisdiction. Food safety and food labeling is something that is sort of at the core of what the FDA does, and as counsel just deluded to, the FDA is all over the issue of caffeine and food and dietary supplements these days. They have responded to congressional inquiries by saying that, We are conducting an ongoing study of the safety of caffeine in food and dietary supplements; that we are going to ask the Institute of Medicine to conduct a workshop to evaluate whether or not there is any risk to vulnerable populations. And I recognize that the Court in its tentative has said it was unnecessary to look at the documents which we asked the Court to take judicial notice; but I would ask the Court to reconsider that because they show that, in fact, the FDA today is looking at the very issues that plaintiff is asking this Court to examine and to substitute its judgment for the judgment of the federal agency that's entrusted with responsibility for food safety and labeling. And because of the primary jurisdiction doctrine, I think the appropriate action on the motion to dismiss is not to grant leave to

amend to this -- at this point. The Court is never going to determine that a 140 milligrams is safe but 180 is not. I mean, those are determinations that are peculiarly within the expertise of the Food and Drug Administration.

Similarly, whether or not there has to be a warning beyond the warning that is on all Monster cans about not recommending consumption by children, pregnant or nursing women or those who are sensitive to caffeine, whether there should be an additional caution for people with heart conditions or something of the like. You know, that's not a determination that would normally be made by a Court. That is something that is entrusted by Congress to the FDA, and the FDA has required warnings where after its own scientific study, it is determined that warnings are appropriate. And as the FDA has said in public statements within the last year, they are evaluating whether or not, there should be any additional labeling or warnings required of any food to which caffeine is added.

And so I would ask the Court to consider supplementing the tentative by addressing the primary jurisdiction argument.

And finally, to the extent that there is going to be an amendment, the Court mentions in discussing the *Pom Wonderful* case that it only addressed preemption with respect to the Lanham Act. That is correct with regard to

the Ninth Circuit decision. They didn't reach the state law grounds that were articulated in the complaint because the District Court had not done so. As we point out in our briefs on remand, Judge Otero did, in fact, find that the state law claims just like the Lanham Act claim were preempted for the very same reasons that a state law cannot impose a requirement that is different from what federal law imposes. And if it's a requirement imposed by federal law, then it's preempted. So I would ask the Court to perhaps take another look at that.

THE COURT: All right.

MR. MARMALEFSKY: Thank you.

THE COURT: Do you wish to respond?

MS. MEHDI: Your Honor, I just have one additional thing to add to what I said based on counsel's argument.

On the standing issue, counsel mentioned that plaintiffs are not nine-year-olds. Yes, they're not nine-year-olds. Yes, they're not 9-year-olds today; but they were only 16, at least two of them were, when Monster handed out free cans without asking how old they were.

Also, the nine-year-old reference is not my document. It's Monster's document. They were targeting trophy kids. So the fact that all of my plaintiffs are not nine-year-old's is not the end of the inquiry, because the question really is beyond that. The question is about

marketing and the advertising conduct that's at issue in our complaint. And the fact that the warning on the label -- on the can has nothing addressed at youth.

Thank you, Your Honor.

THE COURT: All right. Thank you. I'll take the matter under submission. You can return your copies of the tentative to the clerk.

(Whereupon proceedings are adjourned.)

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C E R T I F I C A T E

ALEC FISHER :

vs. : No. CV 12-02188-VAP

MONSTER BEVERAGE CORPORATION, :

MONSTER ENERGY COMPANY, ET AL.

I, MARIA BUSTILLOS, OFFICIAL COURT REPORTER, IN AND FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT TO SECTION 753, TITLE 28, UNITED STATES CODE, THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

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/S/_____ 08/21/2013

MARIA R. BUSTILLOS DATE
OFFICIAL REPORTER

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